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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 772

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY,
Appellant,

vs.

JOHN D. BINGAMAN, COMMISSIONER OF REVENUE FOR THE STATE OF NEW MEXICO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT AS TO JURISDICTION.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT OF JURISDICTION.

Filed December 24, 1935.

In compliance with Rule 12 of the Supreme Court of the United States, Appellant herewith submits his statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above entitled cause.

A.

Statutes.

This cause was tried before a statutory three judge court and the statutory jurisdiction of this Court to review by direct appeal the order or decree herein complained of is conferred by the Acts of March 4, 1913, Chapter 160, 37 Stat. 1013; February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; United States Code, Compact Edition, Title 28, Section 380.

It is provided by the last sentence of said section as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

The statute of the State of New Mexico, the validity of which is involved, is Chapter 56 of the 1935 Session Laws of the State of New Mexico, which said chapter is in words and figures following, to-wit:

CHAPTER 56.

AN ACT TO AMEND CHAPTER 139 OF THE SESSION LAWS OF 1933, RELATING TO REGISTRATION FEES FOR MOTOR VEHICLES, HOUSE BILL NO. 71; APPROVED FEBRUARY 21, 1935.

Be It Enacted By the Legislature of the State of New Mexico:

SECTION 1. That Chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(a) A non-resident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, county or other place for which the owner is a resident and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fees to this state during a period of three months from the time such vehicle is first brought into this state.

"(b) A non-resident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for compensation or for the transportation of merchandise, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state; Provided, however, that motor vehicles properly licensed in any other state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load of livestock, farm or dairy products or lumber, may be allowed to make trips within the state and remain on each trip within the state not exceeding four days, without being registered or required to pay the mileage or other fees, in this state, in the event that under the laws of such other state or country, similar or like exceptions are granted to motor vehicles registered under the laws of and owned by residents of this state.

"(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state, Pro-

vided, however, salesmen, agents or representatives with no permanent place of business in this state and who are traveling through the State for the purpose of calling on retailers, wholesalers or jobbers for the purpose of taking orders for future delivery, shall be required to register any motor vehicle used by them in such business and pay therefor a registration fee of Five ($5.00) Dollars, for which an appropriate license tax shall be furnished by the motor vehicle commissioner.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of Revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificates, issued by said Commissioner, which shall show upon the face thereof the

registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

SECTION 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

C.

Date of Judgment and of Application for Appeal.

The judgment and decree of the District Court was entered on the 24th day of December, 1935, and the petition for appeal was filed on the 24th day of December, 1935, and allowed on the 24th day of December, 1935.

Nature of the Case.

The petition of plaintiff was one seeking to enjoin John D. Bingaman as Commissioner of Revenue for the State of New Mexico from enforcing Chapter 56 of the 1935 Session Laws of the State of New Mexico against the plaintiff herein in his interstate commerce operations in so far as the same relate to the use of the highways of the State of

New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale as in subdivision (d) of said Chapter 56 provided.

The defendant filed his return to the rule to show cause and answer to the complaint wherein many of the allegations of plaintiff's petition were admitted and some were denied. Defendant also, by his answer, set up several defenses. A stipulation of facts, ultimate in character, to be considered by the court, was entered into between the parties to the cause and was filed in the case. In addition thereto oral testimony was introduced by both parties at the time of the trial of this cause.

Prior to the time of defendant's filing said return and answer a temporary restraining order was issued, and upon a hearing set upon the rule to show cause why a temporary injunction should not issue, it was agreed in open court between the court and the parties plaintiff and defendant that the matter should then and there be heard upon its merits, and that the judgment of the court should be final upon the question of whether a permanent injunction should be granted or denied.

The court took the cause under advisement and on the 30th day of November, 1935, filed its findings of fact and opinion, and thereafter, to-wit, on the 24th day of December, 1935, entered its final judgment dissolving the temporary restraining order, assessing defendant's damages and dismissing plaintiff's bill of complaint.

Ruling of the Court.

In its decree filed the court ruled that said Chapter 56 of the 1935 Session Laws of the State of New Mexico was not in contravention of nor repugnant to the due process clause and the equal protection clause of the Fourteenth Amendment of the United States Constitution, nor of the

commerce clause, to-wit, Section 8, Article 1 of said Constitution, and that said Chapter 56 was not repugnant to and had not been repealed by Chapter 136 of the 1935 Session Laws of the State of New Mexico, and was therefore a valid Act.

Cases Sustaining Jurisdiction.

The following decisions are believed to sustain the jurisdiction of this Court on an appeal from a decree from a statutory three judge court wherein the question involved is whether the State of New Mexico may levy a tax upon interstate commerce in its use of the highways for the transportation of a motor vehicle on its own wheels for the purpose of selling or offering for sale, as is provided in subdivision (d) of Chapter 56, 1935 Session Laws of the State of New Mexico:

Hendricks v. *Maryland,* 235 U. S. 610, 35 S. C. Rep. 140, 59 L. Ed. 385.

Clark v. *Poor,* 274 U. S. 554, 71 L. Ed. 1199.

Interstate Buses Corporation v. *Blodgett,* 276 U. S. 245, 72 L. Ed. 551.

Sprout v. *South Bend,* 277 U. S. 163, 72 L. Ed. 833.

Interstate Transit Co. v. *Lindsey,* 283 U. S. 183, 75 L. Ed. 953.

Aero Mayflower Transit Company v. *Georgia Public Service Commission,* 79 L. Ed. (Adv. Op.) 749.

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